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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellant,

against

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Appellees move pursuant to Rule 16 of the Rules of this Court for affirmance of the judment of the United States District Court for the Southern District of New York, entered on September 1, 1976, declaring New York Executive Law § 215(3) valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Executive Law § 215(3) excludes aliens from membership in the New York State Police.

The procedural history of the case and facts set forth in appellant's Jurisdictional Statement, pp. 3-4

THE JUDGMENT BELOW, SUSTAINING THE EXCLUSION OF ALIENS FROM MEMBERSHIP IN THE NEW YORK STATE POLICE, CONFORMS WITH PRIOR DECISIONS OF THIS COURT.

New York State Police are officers of the executive branch of state government and perform governmental functions. New York Executive Law §§ 31, 210; New York Public Officers Law §§ 2, 3(1). *City of Albany* v. *Standard Accident Insruance Co.*, 8 A.D. 2d 247, 249, 18 NYS 2d 243, 244 (3rd Dep't 1959); Op. Atty. Gen., 13 St. Dept. 430 (1917); majority opinion, A25-A28.* Aliens have been excluded from the State police since the force was established in 1917.

The responsibilities of State police officers include protecting the life of the Chief Executive and the lives of visiting foreign dignitaries, protecting the people from subversion, riot and civil disorder and preventing and detecting crime.** Executive Law § 223; majority opinion, A25-A29. The officers carry weapons on duty and may carry them at all other times. They must take appropriate action whenever they observe criminal conduct and are on call 24 hours a day. Their jurisdiction is statewide. Majority opinion, A28.

State police officers perform discretionary functions. Majority opinion, A23-A24. Compare dissent, A50-A53. Perhaps, "[t]he most important facet of the patrol officer's work is the discretion that he exercises in dealing with

* References prefixed by the letter "A" refer to the opinions of the district court as reproduced in Appendix A to the Jurisdictional Statement filed herein.

** In 1974, the New York State Police made over 50,000 arrests for felonies, misdemeanors and offenses. Two hundred of these arrests were made assisting federal authorities in the enforcement of federal laws relating to illegal aliens.

everyday problems." F. Vandall, Training to Meet the Police Function, 1971 Wisconsin Law Review 547, 549 (1971). He must determine whether the conduct he has observed constitutes a crime and, in addition, is called upon to make decisions which are political, social and psychological in character and "very much affected by the democratic nature of American society." F. Remington, The Role of Police in a Democratic Society, 56 Journal of Criminal Law, Criminology and Police Service 361 (1965). He must be "personally committed to the proper application and enforcement of the laws of the United States" and of New York. Majority opinion, A29 quoting *United States v. Gordon-Nikkar*, 518 F 2d 972 (5th Cir 1975).

The district court majority first examined New York Executive Law § 215(3), the current statutory basis for excluding aliens from the State police, to determine whether the traditional or heightened equal protection test was appropriate. Majority opinion, A19-A22. It correctly concluded that the traditional test of reasonable relation to a legitimate State interest was appropriate. Majority opinion, A22-A24.

The majority view arises from and is consistent with the express limitations this Court placed on its holding in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). The Court stated its "scrutiny" of classifications based on alienage would not be "so demanding" when it dealt with "matters resting firmly within a State's constitutional perogatives," "matters" including the "qualifications of an appropriately designated class of [State] public office holders." (413 U.S. at 648. "[I]mportant nonelective executive positions" and "officers who participate directly in the formulation [or] execution of broad public policy" were cited as examples of the classes of positions from which aliens could be excluded without strict scrutiny because the functions incident to the positions "go to the heart of representative government." 413 U.S. at 647. In light of the identifica-

tion of the State police officer with the executive branch, his obligation to protect the governmental structure and the constitutional rights of all persons and his discretion in the enforcement of criminal statues, the district court majority found that *Dougall* permitted review of Executive Law § 215(3) under the traditional equal protection test. Majority opinion, A22-A24.

The dissenting opinion (A48-A53) and appellant herein (Jurisdictional Statement, pp. 5-6) seeks to avoid the *Dougall* references to the executive and judicial branches of government, focusing almost entirely upon the voter and legislator as the only positions from which aliens can be excluded without strict scrutiny. This reading of *Dougall* is contrary language of the opinion which refers specifically to "important executive, legislative and judicial positions." 413 U.S. at 647. Nor is there any other basis for elevating the legislative over the executive and judicial functions given the American political tradition of three co-equal branches of government. The dissent's suggestion that "some high executive officials" (A50) could be included with legislators because they act "'politically.'" *Ibid.*, again opposes the *Dougall* language which includes policy "executors" as well as policy "formulators" and "important" positions in all three branches of government. 413 U.S. at 647. Nor is it apparent how the voter, legislator or high executive performs a more important function in representative government than does the State police officer who investigates subversion and decides whether to make an arrest, an act that necessarily results in the deprivation of individual liberty.

Although the district court majority found Executive Law § 215(3) could be properly reviewed under a traditional reasonable relation test, it afforded close judicial scrutiny to the state interests supporting the statute, effectively foreclosing the arguments presented by the dissent and appellant herein. Majority opinion, A24-A41.

Executive Law § 215(3) invokes at least three state interests: the state's right to conduct its sovereign affairs through the agency of citizens not aliens, the need to avoid divided allegiances in performance of police duties and the need for state police officers to be personally committed to the proper application of the laws. See majority opinion, A29-A41. This Court has already recognized that the state has a substantial interest in defining its own form of government and limiting participation in that government to individuals who are within the "political community". *Sugarman* v. *Dougall*, 413 U.S. at 642-643, 646-649; *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1975). It is not seriously questioned that the duties of State police officers are in aid of the preservation of government and are thus sovereign within the meaning of the *Dougall-Blumstein* formulation. The dissent questions, however, whether the duties are sovereign enough to warrant the exclusion of all aliens. Appellees submit that the point must be viewed as foreclosed in their favor by the summary affirmance in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md 1974), aff'd 426 U.S. 913 (1976). The State police officer does not perform a lower or less sovereign function than the federal or state juror. Instructions to juror are more specific than the criminal statutes under which the police officer operates. The suggestion that jurors must be selected expeditiously and thus that administrative convenience allows only those who are already citizens cannot sustain the statute under strict scrutiny, e.g. *Sugarman* v. *Dougall*, 413 U.S. at 645-46; *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971), and is false in addition. Dissenting opinion, A62-A63-A3. Unusual expedition in the preparation of lists of qualified jurors is not required, and the same tests could be used to qualify alien jurors as the dissent contemplates should be used to qualify alien police officers.

Appellant's suggestion that *In re Griffiths*, 413 U.S. 717 (1973), foreclose the issue presented herein in his favor because the attorney performs a higher sovereign function

than the State police officer is equally unsound. Jurisdictional Statement, pp. 7-8. As *Griffiths, supra,* held, the attorney is not a governmental official simply because he is a member of the Bar, and governmental activities may have only a tangential relationship to his practice. The decision does not suggest that citizenship is not an appropriate qualification requirement for an attorney who stands in as close a relationship to the government as the State police officer.

As the district court majority observed, the need for the State police officer to be free of allegiance to the country of his nationality and to be personally committed to the proper application and enforcement of American Laws is profound. A29-A30, A37-A36. The description of the alien as having, at best, divided allegiance is not, as the dissent suggests, a matter of the alien's personal choice, subject to individual investigation and empirical findings. It is a legal result of alien status and can be removed only by naturalization, e.g. *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 585 (1952). Equally, the State need not entrust its self-preservation to individuals who have not yet made an affirmative commitment to its political community. To the extent that an alien may wish to make such a commitment but is disabled from doing so because of durational residence aspects of the naturalization process, his dilemma is beyond the state's power to adjust. Majority opinion, A25-A36.

CONCLUSION

The judgment below declaring New York Executive Law § 215(3) constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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